

JUSTICE FOR ALL: A ROLE FOR ADR EDUCATORS

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- I. PUBLIC TRUST IN THE JUSTICE SYSTEM IS DECLINING
 - A. *Public Trust in the Justice System is at an All-time Low*
 - B. *The Black Lives Matter Movement is a Manifestation of the lack of Trust in the Justice System*
 - C. *The Public Perceives Police Officers as One Part of an Intertwined Justice System*
 - D. *The Judiciary is Perceived as Politicized*
- II. THE WIDENING JUSTICE GAP
 - A. *Litigation has become Cost Prohibitive*
 - B. *People Lack Resources to Pay for Legal Counsel*
- III. KETTERING FOUNDATION PROJECT
 - A. *Public Trust in the Justice System is Key to a Functioning American Democracy*
 - B. *The Community has Expertise in their Experiences and Perceptions of the Justice System*
- IV. ADR EDUCATION AND COMMUNITY ENGAGEMENT
 - A. *ADR Provides Unique Skills to Begin Healing the Public's Declining Trust*
 - B. *ADR Community Mediation Clinics*
 - C. *Community Dialogue and Tools to Process Civil Unrest*
 - D. *Community Relations Programs*
 - E. *Benefit to Law Students*

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** J.D., 2016, Santa Clara University School of Law. I would like to thank Dean Lisa Kloppenberg as well as Maxine Thomas and the Kettering Foundation for asking me to be a part of this incredible project. I would also like to dedicate my work on this project to my grandfather Martin H. Dodd, Jr., who devoted his life to serving others and improving access to critical resources for underserved communities.

V. CONCLUSION

Equal justice under law is not merely a caption on the façade of the Supreme Court building; it is perhaps the most inspiring ideal of our society. It is one of the ends for which our entire legal system exists...it is fundamental that justice should be the same, in substance and availability, without regard to economic status.¹

Fifty years ago, Justice Powell lamented the state of our justice system, concerned about equal treatment and access for all regardless of wealth. Nevertheless, access to justice remains a well-known and well-documented problem within the legal profession today, and our institutions have been slow to change. Moreover, the public's declining trust in the judiciary and the widening justice gap illustrate some communities' feelings of disappointment or betrayal by the justice system and American democracy. Recently, the President Elect of the American Bar Association (ABA), Hilarie Bass, echoed Justice Powell's concerns, and called on law schools to close the justice gap by increasing access to legal services for underserved populations.² While the challenges facing the justice system cannot be resolved by law schools alone, schools and those of us who teach conflict resolution ("ADR") are well placed to sponsor dialogue among law students, legal professionals, and members of the public. Such dialogue would help law students understand public perceptions of the justice system and connect them to non-lawyers and communities outside of the legal sphere. Additionally, this type of community dialogue can build students' ADR expertise and practical skills. It can encourage students to think critically about the justice system, think thoughtfully about reforms, shape their ethical sensibilities, and encourage healing within our democracy.

¹ Justice Lewis F. Powell, Jr., U.S. Supreme Court Justice (Ret.), during his tenure as president of the American Bar Association (August 1976).

² Rebecca Cohen, *ABA President-Elect Hilarie Bass Calls for Law Schools to Innovate*, LAW.COM (Aug. 9, 2016), <http://www.law.com/sites/almstaff/2016/08/09/aba-president-elect-hilarie-bass-calls-for-law-schools-to-innovate/>.

As legal professionals and educators, we have an ethical responsibility to prepare our students for their ethical responsibilities as lawyers. The ABA Model Rules of Professional Conduct charge *all lawyers* with the duty to “seek improvement of the law [and] access to the legal system.”³ Our students will not only be advocates for their future clients, they will be “officer[s] of the court,”—ambassadors for the justice system to their communities.⁴ This role should incorporate an ethical responsibility to engage in sustained efforts to understand the impact of the justice system upon those in their communities. Santa Clara Law students, like those at many law schools, take an Oath of Professionalism when they begin their studies, modeled on lawyer codes of conduct. At Convocation, they raise their right hands and repeat in a pledge led by a judge. They swear to “act with integrity, courtesy, civility, and fairness.” They promise to abide by our school’s honor code and act professionally. Additionally, they pledge to “*improve access to the legal system, the administration of justice, the quality of legal service and the substance of the law itself.*”⁵

Essentially, all lawyers have an ethical obligation to improve access to justice and to enhance the fairness and effectiveness of the justice system.⁶ Thus, legal educators should provide our students—the professionals who will shape the future of our justice system (be it at the local, state or federal level)—with a solid understanding of how it is perceived by the public. Then our students will be better equipped to improve the justice system they will use and administer. Moreover, their outreach to their communities could provide a valuable public service to non-lawyers and the justice system beyond the service to particular clients. Many law schools espouse a duty to serve the common good and promote justice as a moral or ethical matter, be they public institutions or faith-based.⁷

³ MODEL RULES OF PROF’L CONDUCT pmb1. (AM. BAR ASS’N 1983) [hereinafter “MODEL RULES”].

⁴ *Id.*

⁵ Oath of Professionalism, Santa Clara University School of Law (2016) (on file with the authors).

⁶ MODEL RULES, *supra* note 3, at pmb1.

⁷ For example, Santa Clara University School of Law, a Jesuit institution, is “dedicated to educating lawyers who lead with a commitment to excellence, ethics, and social justice” and “educate its students to become lawyers of competence, conscience, and compassion. *Mission Statement*, SANTA CLARA LAW, <http://law.scu.edu/about/mission->

How can educators help students with these ethical duties? As a baseline, our students need to understand public perceptions of the justice system. In our democracy—of the People, by the People, for the People⁸—the justice system must be accessible and meaningful to all, if it is to be considered effective. For the rule of law to be respected, the law must respect all people. Those of us immersed in the law—from first-year law student through judges—can become invested in the constitutional ideals of our justice system, yet there is a wide gulf in how Americans experience the justice system. Even law students beginning to work in the legal profession gain technical expertise, learn the language of the law, and garner more regular experience with the justice system than non-lawyers. Most non-lawyers encounter the system only infrequently as litigants, defendants, or jurors. Others may have had negative experiences with the system, be it from interactions with local police, traffic tickets, small claims court, divorces, or bankruptcies. Some gulf in perceptions about the efficacy of the system between legal professionals and non-lawyers is inevitable. While all Americans are surely influenced by media perceptions, those of us in the legal profession can temper a TV depiction of a judge or a bystander video of a police officer arresting a citizen with knowledge of some very capable, caring individuals in those roles.

The lawyers and law professors are the experts; we are the repeat players. Often, we are the privileged: economically, racially, or in other ways. Moreover, our individual livelihoods often depend on the rule of law and the justice system's existence. Surely, that must influence some of our perceptions about its effectiveness and lead to some natural defensiveness about courts and judges. We may be critics of particular doctrines and practices, and we may work for law reform and court

statement/ (last visited Oct. 16, 2016). "The Law School will also advance knowledge and justice through scholarship and service." *Id.* Similarly, The Ohio State University's Moritz College of Law, a public institution, includes in its mission that the school will "[o]ffer insights on the impact of law and legal institutions on individuals and communities and advocate for changes in law that improve the well-being of people and society," and "[c]ontribute expertise in the public conversations and initiatives that lead to the improvement of law and the administration of justice in Ohio, the nation, and the world." *Vision, Mission, Goal*, THE OHIO STATE UNIVERSITY MORITZ COLLEGE OF LAW, <http://moritzlaw.osu.edu/about/about-moritz/vision-mission-goals/> (last visited Oct. 16, 2016).

⁸ President Abraham Lincoln, Gettysburg Address (Nov. 19, 1863).

process reform, as demonstrated by this Journal and ADR scholars across the country. Nevertheless, legal educators remain closely attached to the justice system, in part through narratives we learned in law school about heroic lawyers and judges and courts shaping our democracy over time for the better, as constitutional rights were extended to more persons. Our students also become invested in our profession during their legal education, as they encounter professors, lawyers, and judges or as they seek to advance their career opportunities. Certainly, they are attaching themselves to the rule of law and the justice system, whether they become civil litigators, prosecutors, transactional attorneys, or pursue law-related jobs.

In contrast, public perceptions about the justice system are at an all-time low in the United States, and many citizens are skeptical that our system lives up to the ideal of fairness and access to justice for all.⁹ If those of us charged with teaching about the legal system, and training the next generation of “officers of the court” don’t recognize and address this gulf in perceptions about the fairness and effectiveness of the justice system—and varying experiences with that system—we risk losing public confidence in the courts and citizen attachment to the rule of law in our democracy. Those of us who teach conflict resolution and prevention have special expertise to bring to bear on the growing gulf between the legal professionals and the public. We can use our skills to equip future legal professionals to understand more fully the perspectives that non-lawyer citizens have about our justice system. We can teach students to engage in non-defensive dialogue with clients, witnesses, jurors, and other citizens. We can work with community groups or minority bar associations to ensure that our students are exposed to the poor and marginalized in their communities. Given the public perceptions of unfairness in our system and the lack of access to that system for so many Americans, explored in Sections I and II below, ADR experts—alongside our students—can bring some measure of healing to our democracy by fostering honest, inclusive dialogue about our justice system and helping to formulate options for making it more effective and fair for all Americans.

Relying on our ADR knowledge, we can train law students to facilitate dialogues in their communities, before or after graduation, so

⁹ See *infra* Section I.

that they can remain connected to public perceptions of the system supporting their livelihood (see Section IV). Mediators often believe that dialogue between people with disparate views can help them identify deeper interests and reach mutually satisfactory solutions to challenges. Likewise, a closer connection between legal professionals and non-lawyers could lead to more meaningful and durable reform for our justice system. Such dialogue could also help our students comprehend better the concerns and lives of their future clients or those they find across the table in settlement negotiations or in a jury pool. As President-Elect Bass stated, legal educators must be at the forefront of changing our legal institutions. Law schools already improve the law and justice system through the scholarship of faculty members, clinics, courses with public service components, and pro bono projects providing legal services (often to those who cannot afford other legal representation). Yet major unmet legal needs remain and public skepticism about the justice system grows, as described in Sections I and II below. As explored in Section III, the Kettering Foundation is addressing different facets of these challenges by engaging legal professionals, judges, educators, and innovators in a series of discussions to help determine how to engage citizens more fully in our justice system and improve its efficacy. In this article, we offer one tool for addressing the effectiveness of our justice system and the ethical obligations of a new generation of lawyers to improve access to justice by specifically focusing on increasing opportunities to use ADR education to help our students understand the justice system from a more comprehensive perspective and practice their ethical obligations to improve it, while building bridges with non-lawyers in their communities.

I. PUBLIC TRUST IN THE JUSTICE SYSTEM IS DECLINING

One of the most important tenets of American democracy is the role of the independent judiciary. A justice system free from the influence of money and political pressure is the foundation that ensures protection of the rights guaranteed by the Constitution. The courts must treat all who come before them fairly to deliver equal justice under the law. No matter a person's economic status, gender, race, religion, sexual orientation, etc., it must be possible to bring legitimate legal grievances

before a neutral decision maker and trust that the outcome will be justly determined based on the rule of law. However, if the public does not trust the judiciary to remain independent and impartial, the entire system will fail.

A. *Public Trust in the Justice System is at an All-time Low*

Recently, public polls have indicated that the American public's trust in the fairness of the courts has been declining.¹⁰ Many people have indicated that they believe that the high barriers to access to the justice system have effectively barred them from bringing legitimate causes of action before a court, and that even if a person has a strong legal complaint, there is waning confidence of an equitable result.¹¹ This sentiment is most heavily concentrated among racial minorities and the poor,¹² and for good reason. In a 2009 report, the Legal Services Corporation ("LSC") determined that "for every client served by an LSC-funded program, one person who seeks help is turned down because of insufficient resources," and that less than one in five legal problems experienced by low-income people "are addressed with the assistance of either a private attorney (pro bono or paid) or a legal aid lawyer."¹³

As most Americans find themselves effectively barred from utilizing the justice system to remedy their own grievances, exposure to

¹⁰ See, e.g., Ron Faucheux, *By the Numbers: Americans Lack of Confidence in the Legal System*, THE ATLANTIC, (Jul. 6, 2012), <http://www.theatlantic.com/national/archive/2012/07/by-the-numbers-americans-lack-confidence-in-the-legal-system/259458>; 43% Say U.S. Justice System Unfair to Most Americans, RASMUSSEN REPORTS (Mar. 26, 2014) [hereinafter "2014 Rasmussen Poll"], http://www.rasmussenreports.com/public_content/archive/mood_of_america_archive/supreme_court_ratings/43_say_u_s_justice_system_unfair_to_most_americans; *Is the U.S. Justice System Fair to Most of Us?*, RASMUSSEN REPORTS (Jul. 23 2015), http://www.rasmussenreports.com/public_content/politics/general_politics/july_2015/is_the_u_s_justice_system_fair_to_most_of_us.

¹¹ See 2014 Rasmussen Poll, *supra* note 10.

¹² *Id.*

¹³ LEGAL SERVICES CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET LEGAL NEEDS OF LOW-INCOME AMERICANS 1 (2009), <http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/JusticeGainAmerica2009.authcheckdam.pdf> [hereinafter "DOCUMENTING THE JUSTICE GAP"].

the justice system has become skewed. While the small minority of the population that can afford it may utilize the tools available through the legal system as a sword—using litigation as a means to achieve a desired (often business-related) outcome—others are only exposed to the legal system first hand if they find themselves as civil or criminal defendants. Moreover, many others base their opinions of the justice system on depictions in the media or on television.¹⁴ This limited engagement with large swaths of the public naturally shapes public opinions about the fairness and efficacy of the justice system.

A 2014 poll from Rasmussen Reports found that public confidence in the fairness of the justice system was at its lowest point in nearly four years of regular surveying.¹⁵ Forty-three percent of all of those polled felt that the justice system is unfair to most Americans.¹⁶ *Most notably, responses in the poll were widely divided based on the respondents' race and economic status.*¹⁷ While 51% of white respondents reported that they felt confident in the system's fairness to racial minorities, 80% of black respondents felt the system was unfair to black and Hispanic Americans.¹⁸ Furthermore, only 33% of all respondents felt the justice system is fair to poor Americans.¹⁹ This is the most pessimistic assessment of the justice system since this polling began in 2010.²⁰

B. *The Black Lives Matter Movement is a Manifestation of the Lack of Trust in the Justice System*

The recent Black Lives Matter protest movement has highlighted the current lack of confidence in the fairness of the criminal justice system, especially within minority communities. The movement originated on social media platforms in 2013 following George

¹⁴ See generally, Kenneth Dowler, *Media Consumption and Public Attitudes Toward Crime and Justice: The Relationship Between Fear of Crime, Punitive Attitudes, and Perceived Police Effectiveness*, J. CRIM. JUST. & POP. CULTURE, 109–26 (2003). Professor Dennis Greene did extensive research on the connection between media reports about courts and public perceptions of the justice system in our democracy.

¹⁵ 2014 Rasmussen Poll, *supra* note 10.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

Zimmerman's acquittal for the killing of Trayvon Martin in Florida, but it was the protests in response to the killing of Michael Brown by a police officer in Ferguson, Missouri that sparked a rapid growth of the protest movement nationwide.²¹ The Black Lives Matter movement has continued to expand over several years, expressing a growing anger and frustration over multiple killings of unarmed people by police, as well as frequent failures of grand juries to bring indictments against the officers involved in these incidents.²²

The highly-politicized atmosphere and growing tensions between the Black Lives Matter movement and police showed no signs of slowing in 2016. According to a database kept by *The Guardian*, over 793 people were killed by police in the U.S. between January and September of 2016.²³ Of those killed, the overwhelming majority are Native American, Black, or Hispanic.²⁴ These include the killings of Philando Castile in Minnesota, Alton Sterling in Louisiana, and Keith Lamont Scott in North Carolina, all three of which were caught on video, sparking widespread protests throughout the country.²⁵

Additionally, a counter-protest movement called Blue Lives Matter spread rapidly across the country following attacks on police by former U.S. Army member Micah Xavier Johnson during a Black Lives Matter

²¹ Elizabeth Day, *#BlackLivesMatter: The Birth of a New Civil Rights Movement*, THE GUARDIAN (July 19, 2015), <https://www.theguardian.com/world/2015/jul/19/blacklivesmatter-birth-civil-rights-movement>.

²² *Id.*

²³ *The Counted: People Killed by police in the U.S.*, THEGUARDIAN.COM, <https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database> (last visited Sept. 22, 2016).

²⁴ *Id.*

²⁵ James Poniewozik, *A Killing. A Pointed Gun. And Two Black Lives. Witnessing.*, NY TIMES (Jul. 7, 2016), <http://www.nytimes.com/2016/07/08/us/philando-castile-facebook-police-shooting-minnesota.html>; see also Jasmine C. Lee, Iaryna Mykhyalshyn, & Anjali Singhvi, *At Least 88 Cities Have Had Protests in the Past 13 Days Over Police Killings of Blacks*, NY TIMES (July 16, 2016), <https://www.nytimes.com/interactive/2016/07/16/us/protesting-police-shootings-of-blacks.html>; Renae Merle, Wesley Lowery & Peter Holly, *Amid Pressure, Charlotte Police Release Videos in Shooting of Keith Lamont Scott*, WASH. POST (Sept. 25, 2016), https://www.washingtonpost.com/national/amid-pressure-charlotte-police-release-video-in-shooting-of-keith-lamont-scott/2016/09/24/f22e8fa8-82a0-11e6-8327-f141a7beb626_story.html?utm_term=.8a80f2737d56.

Protest in Dallas, killing five officers.²⁶ A separate attack on police ten days later in Baton Rouge by a self-identified “black separatist” left three officers dead and another three wounded, further increasing the polarization within the community.²⁷ While there was no direct link between these shooters and the Black Lives Matter movement, some of the public nevertheless associated these attacks as related to the growing tensions between the police and the Black community. As a result, the counter-protest group Blue Lives Matter, which had been in existence since 2014, gained national media attention.²⁸ Thus, rather than work to improve community relations between the Black community and police, tensions have increased as many Americans ask others to choose between denouncing police shootings of unarmed citizens or supporting police officers themselves (or the military). The recent controversy following national anthem protests by NFL quarterback Colin Kaepernick and other athletes exemplifies the way the American public has focused on the polarization.²⁹ This bifurcation only leads to more tension and fractured perceptions of police and their role within the larger justice system.

C. The Public Perceives Police Officers as One Part of an Intertwined Justice System

Failures in one sector of the justice system affect public perceptions of the system as a whole. In law schools, we teach our students about the difference between the executive and judicial branch, the special role of the courts as more independent of political pressure, enforcing constitutional safeguards and issuing unpopular decisions when the law demands. But, many non-lawyers do not distinguish clearly between police conduct and the justice system, seeing these as necessarily connected. For example, in a poll focused on public perceptions following the events in Ferguson and New York, 43% of those polled

²⁶ Carmah Townes, *More ‘Blue Lives Matter’ Bills Expected Across the Country After Dallas Shooting*, THINK PROGRESS.ORG (July 11, 2014), <https://thinkprogress.org/more-blue-lives-matter-bills-expected-across-the-country-after-dallas-shooting-75508b94c06e#.i4eqe26f3>.

²⁷ *Id.*

²⁸ *Id.*

²⁹ See Michael Powell, *Colin Kaepernick Finds His Voice*, N.Y. TIMES (Sept. 13, 2016), <https://nyti.ms/2kpk3Xr>.

indicated that the decisions not to indict police officers for the killings of Michael Brown and Eric Garner decreased their overall confidence in the legal system.³⁰ Confidence in the system was already declining before the events in Ferguson and New York. In 2012, for example, a public poll found that only 26% of American voters believed the “civil justice system provides timely reliable resolution of disputes.”³¹ *Furthermore, the same poll indicated that “only 6 percent of the electorate wants the civil justice system to stay as it is, while an overwhelming 92 percent want some sort of change.”*³²

At its core, the Black Lives Matter movement focuses on unfair treatment of minorities within the justice system. The movement’s website states that Black Lives Matter is aimed at “broadening the conversation around state violence to include all of the ways in which black people are intentionally left powerless at the hands of the state.”³³ In 2016, President Obama stated that this conversation can only produce real change if it takes place at a local level. The President called on community leaders to “create these kinds of conversations before crises happen.”³⁴ As representatives of the justice system, ADR professionals and educators have a responsibility, and some useful skills, to help lead these community engagement efforts. Any potential reforms to the justice system cannot be insular. A dialogue about the needs of all community stakeholders is necessary in order to identify the deepest needs of the community and incorporate their expertise about the best options moving forward.

D. *The Judiciary is Perceived as Politicized*

Two separate polls indicate that despite the emphasis on an “independent judiciary” in our country, a growing number of Americans

³⁰ See *Race Shapes Americans’ Attitudes about Decisions in Ferguson and Staten Island*, MARIST POLL (Dec. 7, 2014), <http://maristpoll.marist.edu/127-race-shapes-americans-attitudes-about-decisions-in-ferguson-and-staten-island>.

³¹ Faucheux, *supra* note 10.

³² *Id.*

³³ *About the Black Lives Matter Network*, BLACKLIVESMATTER.COM, <http://blacklivesmatter.com/about/> (last visited Mar. 3, 2017).

³⁴ Jordyn Phelps, *8 Powerful Quotes from President Obama’s ABC Town Hall*, ABC NEWS (Jul. 14, 2016), <http://abcnews.go.com/Politics/powerful-quotes-president-obamas-abc-town-hall/story?id=40591539>.

believe that politics play a significant role in judicial outcomes. A national survey from the National Center for State Courts (NCSC) found that “[d]oubts about partisanship [and] political bias represent the greatest threat to public confidence.”³⁵ Fifty-six percent of those surveyed expressed the belief that the judges in their state were politically biased, and 46% expressed the belief that these judges “make decisions based more on their own beliefs and political pressure” than on “an objective review of the facts and the law.”³⁶

By design, the judicial branch—particularly the unelected and life-tenured federal court branch authorized by Article III—is intended to be insulated from the political pressures inherent in the other two branches of government.³⁷ Despite this design, the judiciary has become a major topic in recent political discourse and another symbol of the polarization of the American electorate. A large majority of the public has expressed the belief that politics played “too great a role” in the recent Supreme Court decisions on the Affordable Care Act, and “only thirty-seven percent of Americans express more than some confidence in the Supreme Court.”³⁸ This politicization of the nation’s highest Court is made clear by the fact that the United States Supreme Court was without a ninth justice for over a year following Justice Scalia’s death in February 2016, as the process to replace him became mired in partisan political gamesmanship.³⁹ The Republican controlled Senate refused to hold confirmation hearings for President Obama’s nominee, Judge Merrick Garland, despite the fact that Judge Garland is largely

³⁵ Letter from GBA Strategies to Nat’l Ctr. for State Courts (Dec. 4, 2014), <http://jpo.wrlc.org/bitstream/handle/11204/3967/Analysis%20of%20National%20Survey%20of%20Registered%20Voters.pdf?sequence=4>.

³⁶ *Id.*

³⁷ Alexander Hamilton explained the importance of the independent judiciary in Federalist No. 78, stating, “The complete independence of the courts of justice is peculiarly essential in a limited Constitution.” FEDERALIST NO. 78 (Alexander Hamilton).

³⁸ Eric Hamilton, *Politicizing the Supreme Court*, 65 STAN. L. REV. ONLINE 35, 35 (2012), <http://www.stanfordlawreview.org/wp-content/uploads/sites/3/2012/08/Hamilton-65-SLRO-35.pdf>.

³⁹ See Charlie Savage, *Strategic Debate in Gorsuch Battle: Use Filibuster Now or Later?*, N.Y. TIMES (April 4, 2017), <https://www.nytimes.com/2017/04/04/us/politics/supreme-court-gorsuch-filibuster.html>; Jeffrey Rosen, *Judge Garland’s Nomination, Day 126*, N.Y. TIMES (July 20, 2016), <http://www.nytimes.com/2016/07/20/opinion/judge-garlands-nomination-day-126.html?ref=topics>.

considered to be a moderate choice with a large base of supporters in both parties.⁴⁰ Then, the Republican nominee, Justice Neil Gorsuch, was confirmed only after a political stalemate that led to Republican Senate leadership invoking the “nuclear option” and changing parliamentary rules to disallow the use of the filibuster to block Supreme Court nominations.⁴¹ This politicization of the courts is worsened still by rhetoric of public officials suggesting that judicial decisions are based on political motives. During the 2016 election, then candidate Donald Trump made headlines when he called into question the ability of a judge to be impartial solely due to the judge’s ethnicity.⁴² Later, as President, Trump referred to a U.S. District Judge as a “so-called judge” in response to an injunction blocking implementation of his Executive Order that prevented travel from seven predominantly Muslim countries.⁴³ Congressional refusal to act on a qualified Supreme Court nominee and this type of political rhetoric used by the holder of the highest public office in the country only serve to amplify the public perception that outcomes in the justice system are influenced by political factors rather than the rule of law.

II. THE WIDENING JUSTICE GAP

In addition to the perceptions of the justice system shaped by political battles and the Black Lives Matter movement, structural issues fuel public perceptions of an inadequate justice system. The high barriers of access to justice are a primary reason for the declining public confidence in the American justice system. In ranking systems based on accessibility and affordability, as well as freedom from discrimination and corruption, a 2015 report by the World Justice Project ranked the

⁴⁰ *Id.*

⁴¹ Matt Flegenheimer, *Senate Republicans Deploy ‘Nuclear Option’ to Clear Path for Gorsuch*, N.Y. TIMES (April 6, 2017), <https://www.nytimes.com/2017/04/06/us/politics/neil-gorsuch-supreme-court-senate.html>.

⁴² Brent Kendall, *Trump Says Judge’s Mexican Heritage Presents ‘Absolute Conflict’*, WALL ST. J. (June 3, 2016), <http://www.wsj.com/articles/donald-trump-keeps-up-attacks-on-judge-gonzalo-curiel-1464911442>.

⁴³ Amy B. Wang, *Trump lashes out at ‘so-called judge’ who temporarily blocked travel ban*, WASH. POST (Feb. 4, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/02/04/trump-lashes-out-at-federal-judge-who-temporarily-blocked-travel-ban/?utm_term=.6c2fc17e737e.

United States twenty-first in the world in civil justice and twenty-third in the category of criminal justice.⁴⁴ In 2009, the Legal Services Corporation (“LSC”) reported that “only one legal aid attorney is available for every 6,415 low-income people.”⁴⁵ There is an incredibly high need within the low-income population for attorneys to help with “essential human needs such as protection from abusive relationships, safe and habitable housing, access to necessary healthcare, disability payments to help lead an independent life, family law issues including child support and custody actions, and relief from financial exploitation.”⁴⁶ However, the high cost of litigation, the lack of funding for legal services organizations, and the high cost of legal education have made the availability of attorneys who are willing to take on such cases scarce.⁴⁷

A. *Litigation has become Cost Prohibitive*

According to a study by the NCSC, “a majority of attorneys surveyed believe that potential litigation costs can inhibit filing of cases or force cases to settle that should not settle based on the merits.”⁴⁸ In the NCSC survey, \$100,000 was the median amount in controversy cited as the threshold when attorneys were determining the cost-effectiveness of litigation.⁴⁹ This significant cost inhibits attorneys from taking cases that are not lucrative and is a primary reason why civil trials have become increasingly rare.⁵⁰ The lack of access to legal services is not isolated to low-income Americans. Those in the middle-class have found themselves unable to afford to pay the high prices of hiring a private attorney, but also have incomes too high to qualify for legal

⁴⁴ WORLD JUSTICE PROJECT, RULE OF LAW INDEX 30-31 (2015), http://worldjusticeproject.org/sites/default/files/roli_2015_0.pdf.

⁴⁵ LEGAL SERVICES CORP., *supra* note 13, at 1.

⁴⁶ *Id.*

⁴⁷ *Id.* at 1–3.

⁴⁸ Brittany Kauffman, *Study on Estimating the Cost of Civil Litigation Provides Insight into Court Access*, INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM (Feb. 26, 2013), <http://iaals.du.edu/blog/study-estimating-cost-civil-litigation-provides-insight-court-access>.

⁴⁹ *Id.*

⁵⁰ *Id.*

aid.⁵¹ A 2013 report by the NCSC found the median total cost of common types of litigation to range anywhere between \$43,000 to \$122,000 if the cases are taken all the way through trial.⁵² In addition, over the past ten years, demand for paid legal services has declined, but legal fees have increased over the same ten-year period by thirty-six percent.⁵³ In 2014, the decline in demand was most heavily concentrated in services like litigation and bankruptcy, which are more likely to be utilized by low or middle income people, while corporate and tax services declined to a much lesser degree and increased slightly.⁵⁴

B. *People Lack Resources to Pay for Legal Counsel*

This high cost of access to the civil courts keeps many people within the U.S. from ever attaining legal representation and access to the court system. LSC reported that “for every client served by an LSC-funded program, one person who seeks help is turned down due to limited resources.”⁵⁵ So, while there is a high need for legal representation within the low-income population, those who seek legal representation will only be able to obtain it 50% of the time. Furthermore, LSC found that “only a small fraction of the legal problems experienced by low-income people (less than one in five) are addressed with the assistance of either a private attorney (*pro bono* or paid) or a legal aid lawyer.”⁵⁶ Therefore, LSC estimates that in order for this need to be met, the federal share for legal services funding must grow to at least five times the current budget.⁵⁷

⁵¹ Nathan Koppel, *More Strapped Litigants Skip Lawyers in Court*, WALL ST. J. (Jul. 22, 2010), <https://www.wsj.com/articles/SB10001424052748704229004575371341507943822>.

⁵² Paula Hannaford-Agor & Nicole L. Waters, *Estimating the Cost of Civil Litigation*, 20 COURT STATISTICS PROJECT 1, 7 (Jan. 2013), http://www.courtstatistics.org/~media/Microsites/Files/CSP/DATA%20PDF/CSPH_online2.ashx.

⁵³ CENTER FOR THE STUDY OF THE LEGAL PROFESSION, 2015 REPORT ON THE STATE OF THE LEGAL MARKET 3-5 (2015), <http://www.law.georgetown.edu/academics/centers-institutes/legal-profession/upload/FINAL-Report-1-7-15.pdf>.

⁵⁴ *Id.* at 4.

⁵⁵ LEGAL SERVICES CORP., *supra* note 13, at 9.

⁵⁶ *Id.* at 1.

⁵⁷ *Id.* at 27–28.

As the price of legal representation increases, it is no surprise that a growing number of civil litigants are choosing to appear *pro se* before the court.⁵⁸ Data is unavailable on the total number of litigants who choose to represent themselves each year, but a 2010 survey of state court judges by the American Bar Association found that 60% of judges surveyed reported an increase in *pro se* litigants.⁵⁹ A study published in 2016 on self-represented litigants in U.S. family courts found that while most *pro se* litigants desired representation, cost was the predominant factor in why they decided to represent themselves.⁶⁰ Furthermore, the study found that the *pro se* litigants felt they were “at a disadvantage as compared to represented parties,” and that “[s]elf-representation can negatively impact outcomes.”⁶¹ Negative outcomes in a civil case can have a significant impact on the litigant’s life—whether it is the loss of a home or custody of a child, or failure to obtain compensation for an injury. Thus, it would not be surprising that such an experience would negatively affect the litigant’s perception of the fairness and efficacy of the justice system as a whole.

Again, access to justice issues must be addressed in multiple ways and law schools do contribute significantly today through faculty scholarship,⁶² social justice and public interest programs,⁶³ and

⁵⁸ See Koppel, *supra* note 51.

⁵⁹ *Id.*; Terry Carter, *Judges Say Litigants Are Increasingly Going Pro Se—at Their Own Peril* (July 12, 2010), http://www.abajournal.com/news/article/judges_say_litigants_increasingly_going_pro_se--at_their_own_.

⁶⁰ Natalie Anne Knowlten et al., *Cases Without Counsel: Research on Experiences of Self-Representation*, in INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., U.S. FAMILY COURT 2 (May 2016), <http://iaals.du.edu/honoring-families/publications/cases-without-counsel-research-experiences-self-representation-us>.

⁶¹ *Id.* at 3.

⁶² See, e.g., 67 S.C.L. Rev (Volume 2, Winter 2016) (a collection of white papers addressing the challenges identified by the ABA Commission on the Future of Legal Services). Deborah Rhode, one of the foremost experts on access to justice in the United States, interviewed for the current Kettering Foundation project by Maxine Thomas and Lisa Kloppenberg, contributed a white paper to the symposium. See Deborah Rhode, *What We Know and Need to Know about the Delivery of Legal Services by Non-Lawyers*, 67 S.C.L. Rev 429 (2016).

⁶³ Santa Clara University School of Law, for example, is proud of its Center for Social Justice and Public Service, which gathers scholars, students, and lawyers interested in a broad range of justice and equity issues. An active student-led Social Justice Coalition

important work done by clinical courses, in particular criminal and civil law clinics in nearly every law school around the country. This article focuses on *additional contributions* that ADR educators can make in these times of civil unrest and dissatisfaction with the justice system by fostering dialogue.

III. KETTERING FOUNDATION PROJECT

The first step in working to find solutions that might close the justice gap and improve public trust in the legal system is to engage all the stakeholders in our communities. This important step is often overlooked. As legal professionals and educators, it is easy for us to believe that we are the experts in the room and that we already understand all there is to know about the problems within the system that we work in every day. We see the chronic underfunding of the civil justice system and the multitude of difficulties encountered by judges, prosecutors and defenders in the criminal system. The need to consult those who do not have the same expertise can seem a low priority among all our weighty, time-pressured responsibilities.

However, if our goal is to address the problems that are not only apparent to us as experts, but also those that are *perceived by members of the public*, then it is necessary to engage those members of the public in identifying the problems as well as the solutions. As discussed in the next Section, ADR educators have a special talent to help convene dialogue and set up regular sessions for continued exchange of information and mutual goal setting and problem solving.

A. *Public Trust in the Justice System is Key to a Functioning American Democracy*

The Kettering Foundation, a global organization promoting citizen engagement with democracy, is based in Kettering, Ohio. A research and convening organization, its central inquiry is: “What does it take for democracy to work as it should?”⁶⁴ The Foundation focuses on several key areas. It espouses that: “Democracy requires responsible citizens

works with the Center. See *Public Interest Social Justice Coalition*, SANTA CLARA LAW, <http://law.scu.edu/pisjc> (last visited Oct. 15, 2016).

⁶⁴ *Core Insights*, KETTERING FOUNDATION, <https://www.kettering.org/core-insights/core-insights> (last visited Sept. 2, 2016).

who can make sound decisions about their future, and can act on these decisions. Through joint learning exchanges, Kettering studies how citizens might accept their responsibility, make sound decisions about what is in the public's interest, and join forces to act on those decisions.”⁶⁵ Kettering's second “core idea” is that “Democracy requires a community, or a society of citizens, that can work together. We research the way citizens face persistent problems in their communities. These problems, such as poverty, violence, and gaps in educational achievement, require citizens, communities, and institutions to work together to address them.”⁶⁶ Its third and final principle fits closely with this article: “Democracy requires institutions with public legitimacy that contribute to strengthening society. While institutions can affect the public's ability to govern itself, they can also unintentionally weaken self-rule by substituting expert knowledge for public knowledge. Aligning institutional routines with citizens' work is the central challenge.”⁶⁷

Kettering began a new research project in 2010 aimed at fostering interactions between experts and citizens aimed at ensuring that the justice system functions as it should in and for our democracy. Entitled “The Role of the Judicial Branch in a Democracy,” the project seeks ways to involve citizens in the work needed to improve the justice system and promote its legitimacy in our democracy. The Foundation has worked with lawyers, judges, and law schools on several projects over the last few decades, thanks in part to the interests and experience of its General Counsel, Maxine Thomas. A former law professor and associate dean at the University of Georgia, Ms. Thomas has worked with Ohio courts and law schools on developing curricula for a major pipeline project to assist at-risk children in Columbus, Cleveland, Cincinnati, and Dayton through an academy introducing them to legal concepts as well as advocacy and conflict resolution skills.⁶⁸ The late Chief Justice Moyer, the pipeline's most ardent advocate, hoped that,

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Kelsey Givens, *Law and Leadership Institute students heading to college at an amazing rate*, ALL RISE 53–57 (Fall 2014), <http://lawandleadership.org/sites/default/files/documents/LLI%20Story%20Final%20PDF.pdf> (Describing the project entitled the “Law and Leadership Institute”).

eventually, these educational and training efforts would strengthen the diversity of Ohio law students, lawyers, and justice system leaders. The Foundation also hoped to promote more engaged citizens, as these students and their families garnered knowledge about the legal system and the students built mentoring relationships with law students, professors, lawyers, and judges. Dean Emerita Nancy Rogers of the Ohio State University Moritz School of Law and the late Professor Dennis Greene of the University of Dayton School of Law devoted substantial time to working on the pipeline project.

The Kettering Foundation has also long convened dialogues between judges, lawyers, and citizens. In the 1990s, Maxine Thomas led these efforts, drawing on her long history of involvement with the American Bar Association (“ABA”). Those interactions led to three publications in the 1990s to help judges and others engage in dialogue with citizens.⁶⁹ Our current project began when Maxine Thomas invited Lisa Kloppenberg, then Dean & Professor of Law at the University of Dayton, to explore the role of the legal system in democracy. Building on the earlier work with the ABA, the Foundation focused on the judiciary’s loss of legitimacy in the eyes of the public. As conversations ensued with members of the public and leaders of the judicial branch,

⁶⁹ In the late 1990s, the Kettering Foundation joined with the American Bar Association Standing Committee on Judicial Independence and the ABA Judicial Division to produce an issue book on citizens and the law. Lawyers, League of Women Voter members, Kettering staff, and National Issues Forum (NIF) participants came together to frame an issue book on the legal system. What came out of that effort was “...*And Justice for All*”: *Ensuring Public Trust and Confidence in the Justice System*. In the forums that ensued, judges, lawyers, and bar leaders heard citizens’ views of justice and the legal system. They heard where citizens had confidence in the justice system and where they did not.

Judges took on this work as a way to listen to the public. They listened to forums and invited NIF members to hold forums in their communities. A lot of the work showed that the public did not understand the system but it also revealed what the public did not like about the system. This work resulted in two additional collaborations with the American Bar Association Coalition for Justice and the ABA Judicial Division which produced two additional issue books, *Reaching a Verdict: What Do We Want for the American Jury System?* and *Under Pressure: How Can We Keep the Courts Fair and Impartial?* More forums were held on these two issues throughout the United States. American Bar Association leadership including Presidents AP Carlton, Dennis Archer, Robert Gray, Jr., staff, and other ABA leadership began to create a different relationship with the public through this work. Kettering Foundation Project Statement, Draft no. 2 (Jun. 6, 2012) (on file with author).

practitioners, researchers, and law students, the project asked: *what would it take to make the justice system function as it should in our democracy?* Next, legal educators were convened to explore the obligations of lawyers and the implications for legal education, the changing demographics in our democracy, and the opportunities presented for improving our methods of training law students. At the time the current project began—after the influential Carnegie Report on legal education and before the economic downturn of the late 2010s—many law schools experimented with curricular reform and discussions of significant change were underway in the legal academy.⁷⁰

B. *The Community has Expertise in their Experiences and Perceptions of the Justice System*

Kettering leaders realized that the conversation was too insular and relied too heavily on experts, with insufficient regard for public opinion. The Foundation thus broadened the conversation to include judges, lawyers, legal educators, law students, and non-lawyers in a series of conversations over several years. Working with several ABA sections, including those involving judges and justice system-media relations, the Foundation used experts to survey non-lawyers in small group settings throughout the country about their perceptions of our justice system. The members of the public generally had respect for the system and judges (e.g., less corrupt than other systems around the world), but they had two major complaints about the courts. First, they said that people who are wealthy or celebrities fare better than regular citizens in our system; money is a huge influence. They also complained about “drawn-out court processes that delay resolution of cases with criminals

⁷⁰ See generally WILLIAM W. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007); A.B.A. SEC. OF LEGAL ED. AND ADMISSIONS TO THE BAR, A SURVEY OF LAW SCHOOL CURRICULA 1313–16 (Catherine L. Carpenter, ed., 2012) http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2012_survey_of_law_school_curricula_2002_2010_executive_summary.authcheckdam.pdf (summarizing curricula reforms in Carnegie period); Lisa A. Kloppenberg, *Training the Heads, Hands and Hearts of Tomorrow's Lawyers: A Problem Solving Approach*, 2013 J. DISP. RESOL. 103 (2013) (summarizing national curricula trends and the University of Dayton's “Lawyer as Problem Solver” reform, signaled out by the Carnegie Foundation for special recognition in 2007).

who are obviously guilty. In every focus group, participants complained that due process was abused and out of control.”⁷¹

When these perceptions were brought back to the larger group of “experts” or “leaders” within the justice system and legal profession, some participants were defensive, explaining the role of courts under our Constitution and laws is as protectors of freedom for all, even on unpopular matters. The experts’ concerns and ideas for justice system reforms also diverged somewhat from the interests of the public, at least as evidenced by those small group reports. This was true even amongst those experts who had been engaged for many years in innovations to improve their own court systems and among people very receptive to the inclusion of other voices.

Despite the defensiveness and emphasis on educating the public more thoroughly about the constraints on the justice system (e.g., cost and funding issues, the lack of control over law enforcement officers in the field, constraints on judges speaking publicly about matters that might come before them, or inaccurate media depictions of the justice system), the conversations did identify several important themes resonating with concerns expressed by the public, including concerns about citizens’ race and socioeconomic status unfairly influencing justice system outcomes. The procedural matters—the cost and delay of the courts—were also seen as significant barriers to achieving justice. The ABA may publish resulting materials and the Foundation continues to host dialogues with legal educators and others,⁷² and other researchers are pursuing different issues associated with the broad theme of the effectiveness of the justice system in democracy.

Clearly, a huge gulf remains between the experts (who understandably attempt to address public concerns by explaining legal doctrine and constitutional protections) and others focused on the perceived reality of the justice system for many in our society. *How can judges, lawyers, legal educators, and students respond less defensively*

⁷¹ Memo from Steve Farkas & Ann Duffet to the Kettering Foundation (Jan. 15, 2013) (on file with author).

⁷² In January of 2016 the Kettering Foundation hosted a discussion with Legal Educators at the American Association of Law Schools conference regarding the findings of the citizen dialogues and how those findings might influence ongoing reforms to legal education. In March 2016, the Foundation hosted a similar discussion with ADR Educators, professionals, and innovators. Notes from both discussions are on file with the authors.

and listen deeply to the concerns of people about our system? In an attempt to begin to bridge this gulf, and given the authors' interests in dispute resolution and educating law students, the remainder of this essay advocates adoption of a dialogue tool for use by ADR educators, law students, and non-lawyers. The next Section offers a few options for ADR educators and law schools to consider.

IV. ADR EDUCATION AND COMMUNITY ENGAGEMENT

Conscious of the economic challenges in legal education today and the debt load carried by many of our students, we strive to offer some options that will not require a lot of new resources. The work of fostering dialogue with community members could be extended to many others in the legal academy—faculty, staff, and students who value working with non-lawyers—but ADR educators and those trained in conflict resolution could be natural *catalysts* for this facilitation work, given their ability to teach others how to engage in non-defensive listening, eliciting information, brainstorming of options, etc.

What can ADR educators and lawyers familiar with mediation and facilitation skills do to foster such dialogue? What role can our students play in these dialogues? The authors believe that some law students (perhaps more closely connected to their communities in age and experience) share some of the skepticism and concerns of non-lawyers about the justice system evidenced in the Kettering research. We also believe some law students would appreciate finding a way to connect to the broader public during their legal studies, whether such connections might help with career opportunities and networking or foster a sense of service or hold larger meaning for their individual legal studies.

Catherine Carpenter, Vice Dean & Professor of Law at Southwestern, has designed a survey for her students as part of the current Kettering Foundation project on the justice system. The survey asks students for their thoughts in several critical areas and assesses the sources forming their perceptions.⁷³ Her research reveals that many students are quite skeptical about the neutrality of judges, the role of politics in the system, and the fairness of the system for minorities and

⁷³ See *Appendix* for a full copy of the survey.

poorer members of our society.⁷⁴ In addition to raising issues of varying perceptions of the justice system among law students and collecting data on the changes of student perspectives throughout their legal education, law schools can use that data to increase opportunities for students to engage in dialogue with members of the public about the justice system. Building on our own students' thinking and the Kettering research described above, we could ask open-ended questions about non-lawyers' perceptions of the justice system and the experiences they, their family, and their friends have had with the civil and criminal systems.

A. *ADR Provides Unique Skills to Begin Healing the Public's Declining Trust*

Designing sustainable structures for ongoing dialogue with the public is an area where ADR education can play an important role. Through ADR education, law students learn important skills that are uniquely tailored to problem solving and conflict resolution, from active listening to dispute systems design. Perhaps most importantly, ADR students learn how to think creatively in identifying solutions to problems, and learn how to engage in constructive, solution-oriented dialogue with all parties involved in a given conflict. Rather than thinking defensively about criticisms of the system, mediation is focused on finding common ground and potential solutions, even if those solutions might require fundamental changes in the ways that justice is administered.

ADR was born out of a need to resolve disputes while avoiding the time, cost, and inflexibility of litigation and a need to empower non-lawyers, i.e., the parties involved in civil disputes.⁷⁵ Through exposure to conflict resolution history, theory, doctrine, and skills, students can

⁷⁴ Results from the 2015 and 2016 surveys show that while roughly half of law students believe that judges generally make their decisions in good faith, a growing majority of law students believe that high profile cases are adjudicated improperly. These results suggest that the students surveyed believe that the publicity and political attention surrounding a given case have an adverse effect on the fairness and objectivity of the outcome. Catherine Carpenter, *Quick Facts: Survey 2016 and a Comparison to 2015*, Justice Survey Report (2016) (on file with the authors).

⁷⁵ LISA KLOPPENBERG ET AL., *RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW* 7–8 (3d ed. 2016).

gain a better understanding of existing attempts to address some of the problems facing the justice system and a better foundation to think about further systemic improvements. Today, arbitration and mediation have become an integrated part of the civil trial system. Many courts require parties to go through mediation to encourage expeditious settlement of the disputes before trial, and judges will often recommend that parties utilize alternatives to trial like arbitration.⁷⁶ In addition, community mediation centers have been established throughout the country to provide dispute resolution services to low-income populations.⁷⁷ Meanwhile, it has been well documented that civil jury trials have become increasingly uncommon.⁷⁸ Between the late 1960s and 2009, the number of civil filings that progressed to a jury trial declined from an estimated 11.5% to just 1.2%.⁷⁹ Thus, ADR has become an integral part of our justice system, rather than a mere alternative to traditional litigation.

However, this proliferation of ADR throughout the legal system has not been reflected as thoroughly in legal education. While some law schools have established mediation clinics and provide skills-based classes focused on mediation and negotiation, these classes primarily remain niche electives. While the Ohio State University Moritz College of Law has been a leader in advancing ADR education through its faculty scholarship and programs like the Certificate in Dispute Resolution,⁸⁰ many law schools provide only a few elective opportunities to expose students to different aspects of ADR practice or less than a majority of their students take an ADR course. Some first-year professors introduce students to arbitration, mediation, or negotiation in Civil Procedure or Contracts courses, but this is not comprehensive. Expansion of ADR programs in law schools presents an opportunity to build “practice-ready” skills in law students while also providing a much-needed forum for community engagement. Clinics or

⁷⁶ *Id.* at 8.

⁷⁷ *Id.*

⁷⁸ See generally Thomas J. Stipanowich, *ADR and the “Vanishing Trial”: The Growth and Impact of “Alternative Dispute Resolution,”* 1 J. EMPIRICAL LEGAL STUD. 643 (2004).

⁷⁹ Xavier Rodriguez, *The Decline of the Civil Jury Trial: A Positive Development, Myth, or End of Justice as We Know It?*, 45 ST. MARY’S L.J. 333, 335 (2014).

⁸⁰ *Program on Dispute Resolution*, OHIO STATE UNIVERSITY MORITZ COLLEGE OF LAW, <http://moritzlaw.osu.edu/program-on-dispute-resolution/> (last visited Sept. 15, 2016).

courses could be designed to be consistent with the new ABA requirement that each law student who begins studies in 2016 will need to complete six units of “experiential learning” before graduation.⁸¹

B. *ADR Community Mediation Clinics*

Beyond courses, ADR clinics provide students with the opportunity to build important skills like active listening, negotiating, and neutral problem solving while providing services to underserved populations. Through experiential learning opportunities like externships and clinics, students are able to interact with clients and take on dispute resolution under the supervision of law professors and licensed attorneys. For example, USC Gould School of Law’s mediation clinic has facilitated hundreds of settlements of a wide range of actual disputes while giving students experience as mediators in as early as their second year of law school.⁸² In addition, the San Mateo County Superior Court in California has been extremely successful in better serving litigants through its Multi-Option Appropriate Dispute Resolution Project (MAP).⁸³ Through this program, the County courts have decreased the caseload of the courts, decreased costs to litigants, and drastically increased litigant satisfaction.⁸⁴ These types of ADR clinics not only provide law students and legal professionals with opportunities to understand the needs of members of the communities they serve but also improve the outcomes and satisfaction of litigants who often would not be able to afford to carry their case through a lengthy and costly jury trial.

C. *Community Dialogue and Tools to Process Civil Unrest*

In addition to the contributions made by ADR clinics, law schools could provide a platform for establishing community dialogue and

⁸¹ *ABA Standards and Rules of Procedure for Approval of Law Schools 2016-2017*, 2016 A.B.A. Sec. Legal Educ. & Admissions to Bar at Standard No. 303(a), http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_aba_standards_and_rules_of_procedure.authcheckdam.pdf.

⁸² *Mediation Clinic*, GOULD.USC.EDU, <http://gould.usc.edu/academics/clinical-programs/mediation-clinic/> (last visited Sept. 15, 2016).

⁸³ Sheila Purcell, *Growing Mediation in Our Courts: Why and How One Court Made the Journey*, CAL. CT. REV. 13, 13 (2007).

⁸⁴ *Id.* at 15.

processes for addressing civil unrest at the broader social level without significant expense. With the ABA's new experiential learning requirement, courses could be designed to prepare students for community dialogues about the justice system, to conduct them, and to reflect on them, producing more knowledge of public perceptions and perhaps some suggestions for improvement of the justice system. To meet the new ABA standard on experiential learning, the courses must combine theory, doctrine, skills, and ethical principles in a single course, which is also more than half experiential.⁸⁵

Dean Emerita Nancy Rogers recently emphasized the importance of proactive community engagement and sustained involvement of intervenors who can facilitate community dialogue between stakeholders when a polarizing conflict arises.⁸⁶ Rogers examined the important role that intervenors from the Justice Department's Community Relations Service played in communities, and advocated for the establishment of intervenors at the state, regional, or local level.⁸⁷ These offices would be more in touch with the different needs of their communities, and have a better understanding of the underlying local dynamics involved in a community conflict.⁸⁸ This point has been further developed by the Divided Communities Project at Moritz College of Law, which has released an in-depth report on community responses to civil unrest,⁸⁹ and is working to establish pilot programs for communities to proactively plan for and address potential triggers of civil unrest.⁹⁰

⁸⁵ See generally ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, MANAGING DIRECTOR'S GUIDANCE MEMO: STANDARDS 303(A)(3), 303(B) AND 304 (March 2015)

http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governancedocuments/2015_standards_303_304_experiential_course_requirement_authcheckdam.pdf.

⁸⁶ See generally Nancy Rogers, *When Conflicts Polarize Communities: Designing Localized Offices that Intervene Collaboratively*, 30 OHIO ST. J. ON DISP. RESOL. 173 (2015).

⁸⁷ *Id.* at 177.

⁸⁸ *Id.* at 202.

⁸⁹ See generally DIVIDED COMMUNITY PROJECT, PLANNING IN ADVANCE OF CIVIL UNREST (2016) <http://moritzlaw.osu.edu/dividedcommunityproject/wp-content/uploads/sites/101/2016/05/Planning-in-Advance-January-2016.pdf>.

⁹⁰ See *Divided Community Project*, MORITZLAW.OSU.EDU, <http://moritzlaw.osu.edu/dividedcommunityproject/> (last visited Sept. 15, 2016).

D. *Community Relations Programs*

In carrying out the recommendations of Dean Rogers and the Divided Communities Project, law schools could play a central role in establishing community relations programs that would help facilitate the sustained local engagement that is needed, and provide the future leaders of the legal profession with unique opportunities to engage in dialogue with a wide range of community stakeholders. Time and resources are the major hurdles in addressing the root causes of polarization within communities.⁹¹ Community mediation centers face difficulty in maintaining the funding necessary to carry on sustained efforts to address ongoing tensions within communities.⁹²

Law schools could provide a forum for these efforts that would be supported by legal educators and students without the same funding needs as independent community centers. If a law school cannot start a new clinic or course focusing on these issues, and government funding is inadequate to build new CRS projects, law schools could team with ADR projects or existing groups to host dialogues about the justice system. Existing clinics and social justice centers at law schools work with many of the populations impacted heavily by the justice system and may have well-established connections to the communities and the trust and relationships to convene people. Our alumni may have valuable connections to immigrant or minority communities (e.g., through minority bar associations or those of particular practice areas). We urge dialogue hosts to be careful about involving judges or court personnel in these dialogues. Conversation can be more formal and less open when a judge shares a room with attorneys and law students. While any changes in the justice system must ultimately involve judges and court personnel and legislators eventually, it might be wise to start with more open and less formal processes if non-lawyer, non-expert input is sought.

Admittedly, an ADR educator with a civil litigation background can be uncomfortable with the extent that a citizen discussion could be focused on criminal law and procedure (e.g., the nuances of Fourth Amendment law). As noted earlier, however, many citizens don't distinguish between the civil and criminal courts, between police

⁹¹ See Rogers, *supra* note 86, at 205.

⁹² *Id.* at 201.

officers, lawyers, and judges in the way that we do within the legal system.⁹³ They see this all as closely connected. Moreover, responding to citizen concerns requires careful listening, not expertise in the subject matter. We should aim to understand the perceptions, experiences and feelings of people and communities, rather than engage in a teaching exercise about law and procedure.

E. Benefit to Law Students

Finally, ADR educators can encourage law students to think critically about the current challenges facing the legal system and identify creative solutions to address those challenges. In his 2016 Convocation speech at Santa Clara University (upon his installation as a University chair designated for a scholar promoting “ethics and the common good”), Professor Gary Spitko urged incoming law students to “look beyond the black letter of the law” in order to “consider who the law favors and disadvantages, and how, and why.”⁹⁴ He then charged students to “question whether the law should be this way or ought instead to be reformed so as to further social justice, and contemplate whether you might be one to help further that reform.”⁹⁵ If we wish for future legal professionals to take seriously their ethical obligations to improve access to justice and the system itself, they must be encouraged to think critically about those problems and the potential for creative reform to the system. As legal educators, we have the responsibility to provide students with the tools, knowledge, and opportunities necessary to carry these reforms forward.

A community dialogue program focused on the efficacy of the justice system would enhance our students’ professional skills. It would also provide students with unique opportunities to gain insight into the challenges facing the communities in which they will likely live and work, while also providing the work needed to proactively address tensions within the community. It might even help some students develop connections with lawyers, bar associations, or future clients,

⁹³ Kettering Foundation Discussion with Legal Educators and Professionals (January 09, 2016, New York City) (notes on file with the authors).

⁹⁴ Professor Gary Spitko, Remarks at the Santa Clara University School of Law Convocation (Aug. 11, 2016).

⁹⁵ *Id.*

advancing their personal connections with the community and search for career opportunities. This work would also enable our students to make contributions to the broader community during this time of civil unrest and dissatisfaction with the justice system. They would have opportunities to develop skills and thinking about their ethical obligations to improve access to justice and the justice system itself. This outreach and engagement with community might shape their ethical sensibilities and bring communities some degree of healing. For some of our students, we posit that participation in community dialogue about the justice system will add deeper meaning to their legal education.

V. CONCLUSION

If law schools and conflict resolution experts help our students engage in deeper dialogue with the communities they will serve, we will contribute to improving citizen engagement with the justice system in our democracy, working toward solutions for enhancing access to justice and the efficacy of the system itself. For legal education, we will develop new lawyers who are less defensive professionals with a better understanding of the concerns of the public, including their future clients. While practicing ADR skills and honing their ethical responsibilities, the students will gain experience of engagement with non-lawyers in their communities. Our students are likely to be very promising ambassadors to bridge the gulf between those of us who teach about or work in the justice system and those affected by it in our communities.

